'Little Pentagon Papers' Case May Reach Court Before Ellsberg's

By FRED P. GRAHAM
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LOS ANGELES, Aug. 10—Until last week, it would have seemed impossible that Daniel Ellsberg and Anthony J. Russo Jr. could be upstaged as legal figures by Arthur Kunkin and Gerald R. Applebaum.

Dr. Ellsberg and Mr. Russo, the defendants in the celebrated Pentagon papers case, were on the threshold of a trial that was to be a major test of the Government's authority to punish those who disclose its secrets.

Mr. Kunkin and Mr. Applebaum, underground journalists with The Los Angeles Free Press, were defendants in a remarkably similar "little Pentagon papers" case that raised an identical legal issue—whether those who arrange for the publication of "leaked" Government documents may be punished as criminals.

But an appeal to the Supreme Court has now put off the Ellsberg-Russo trial at least until October, and the delay could last well into 1973.

Could Reach High Court

That could mean that the conviction of Mr. Kunkin and Mr. Applebaum for publishing a stolen list of undercover narcotics agents, which is pending before the California Supreme Court, may well reach the United States Supreme Court first. There, it would present the first constitutional test of the new strains that are being placed upon the First Amendment by the impact of the copying machine upon Government secrecy.

The Ellsberg-Russo prosecution and the Kunkin-Applebaum case are the first known instances in which persons who arranged for the publication of "leaked" Government documents have been charged with dealing in stolen property. Many journalists and constitutional experts feel that the similarity between the two episodes is not a coincidence, but rather a product of the rise in investigative journalism—aided by the copying machines that sit in virtually every Government bureau—and Government officialdom's efforts to deal with this new threat to its capacity to keep secrets.

Censorship Feared

Some constitutional lawyers believe that if the Supreme Court does not rule out the use of such laws to punish these leaks, widespread censorship of Government information could eventually develop.

The Federal Government's charges of theft of Government property, espionage and conspiracy against Dr. Ellsberg and Mr. Russo, for allegedly machine-copying top secret papers that were leaked to newspapers, has many parallels in the Free Press case.

The New York Times
Arthur Kunkin

Jerry M. Reznick, a self-described artist who worked as a mail clerk in the California attorney general's office, became disturbed in 1969 about some aspects of law enforcement reflected in some of the confidential papers that passed through his hands.

He machine-copied a report that said that brutality by the campus police at the University of California in Los Angeles was going unpunished, and he took a list of the names, home addresses and telephone numbers of the state's 80 undercover narcotics agents.

Names of All 80

These he delivered to Mr. Applebaum, a reporter for The Free Press, who promised to pay the usual $20 feet the paper gave for information. The Free Press ran front-page articles lambasting the U.C.L.A. police, and denouncing the use of "secret police" to infiltrate society. It printed the names, addresses and telephone numbers of all 80, and some received threatening telephone calls.

Mr. Reznick, Mr. Applebaum and Mr. Kunkin, the publisher and editor of The Free Press, plus The Free Press itself, were all indicted—Mr. Reznick for stealing public documents and the other, for receiving stolen property. Mr. Reznick was convicted first, did not appeal, and later testified against the journalists.

They were convicted of receiving the stolen narcotics list and were given what is believed to be the first criminal penalties against the press in United States history for printing purloined information. Mr. Kunkin was placed on probation for three years and fined $1,000; Mr. Applebaum was given a suspended sentence and fined $500, and The Free Press was given a suspended $500 fine.

Won Hung Jury

One of their lawyers, H. Peter Young, says that, in retrospect, one of the worst breaks of the case was when the defendants won a hung jury on the charges of publishing the U.C.L.A. police report.

"To convict journalists for publishing a story about condoned police brutality would have been such an abvious violation of the First Amendment that no court could have failed to see it," Mr. Young said.

To Prof. Melville B. Nimmer, an expert on copyright law and the First Amendment at U.C.L.A., this illustrates why it would be a blow to press freedom if theft convictions in either the Ellsberg-Russo or Kunkin-Applebaum cases should be upheld. He said it would permit the Government to prevent the publication of embarrassing information, even though it did not involve national or personal safety, on the ground that the documents bearing the information were Government property.

But last March the California Court of Appeals did uphold, 2 to 1, the conviction for publishing the narcotics list. It reasoned that the threat to law enforcement and to the safety of the agents outweighed The Free Press consideration at stake.

In that decision, an American court held for the first time that government information typed on paper is property that government officials can withhold. To machine-copy an internal government document is to steal the information on it, the court held, and to publish such a leaked document amounts to receiving stolen goods.

Based on Justices' Views

The court admitted that nobody could have been convicted if Mr. Reznick had dictated the list on a telephone without ever taking the paper out of the office or copying it. However, it ruled that it was logical to treat documents differently because they constituted a greater threat to governmental secrecy.

The state judges based much of their arguments upon statements made in the opinions of Justice Byron R. White and Potter Stewart last July when the Supreme Court refused to block The New York Times and The Washington Post from publishing the Pentagon papers.

These two Justices, with the general agreement of Chief Justice Warren E. Burger and Justice Thurgood Marshall and Harry A. Blackman, said they thought it would be constitutional under some circumstances to punish journalists who published government secrets.

"Clearly," the California court said, "a majority of the United States Supreme Court is willing to apply laws against the receipts of stolen property to newsmen who knowingly receive stolen documents."

The United States Supreme Court will apparently have an opportunity to say if this is so after the California Supreme Court hears arguments next fall and rules on the case. Both sides have expressed determination to appeal it to the highest court.

If so, at least two major First Amendment issues will remain to be settled in the Pentagon papers trial of Dr. Ellsberg and Mr. Russo, assuming there is ultimately a trial and conviction.

One is whether the espionage laws can be used to punish those who disclose an essentially historic study to the public. The other is whether individuals who leak classified documents can be prosecuted under the general anticonspiracy law on the theory that they plotted to undermine the secrecy system.